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No. 09

IN THE
Supreme Court of the United States

FARASH & ROBBINS, INC.
AND ISIDOR FARASH,

Petitioner,

—against—

FLEET BANK, f/k/a SUMMIT BANK; SUMMIT BUSINESS CAPITAL CORP.; FLEET CAPITAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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August 6, 2009

QUESTIONS PRESENTED

1. Whether the Federal Circuit Court has erred as a matter of law, either statutorily or under the U.S. Constitution, when it mandated that a civil litigant plaintiff to tort claims, specifically involving fraud and negligence counts was required to prevail on other, breach of contract claims, as a prerequisite of obtaining a trial on those tort-based claims.

2. Even if the above question # "1" is affirmed in favor of the respondent, did the Circuit Court err through the imposition of such a requirement, if doing so separately disrupted the Due Process provisions of the U.S. Constitution, by compromising the impartiality of the fact-finder?

3. Is the Circuit Court in error in its interpretation of applicable contract law, when it decided that even though a contract provision is undisputed, in fact admitted to by each and every witnesses and specifically by those numerous witnesses defending the action, that it is nonetheless unenforceable on them because that provision is not specified in the written portion of the contract?

CORPORATE DISCLOSURE STATEMENT

Petitioner hereby identifies Farash & Robbins as a New Jersey Corporation, owned wholly by Isidor Farash and with no public or other private stock ownership.

PARTIES TO THE PROCEEDING

The Petitioner is Isidor Farash, owner of Plaintiff, Farash & Robbins ("F&R") and 3rd party defendant to Fleet's counter-claims. Farash and F&R were litigants in the civil district court action 03-cv-361, before Hon. Dennis Cavanaugh in Newark, New Jersey.

The Respondent is Fleet Capitol Corporation, formerly referenced as "Fleet National Bank" collectively referred to as "Fleet" in this Petition. The parent company of Respondent is Bank of America. Fleet was defendant in the original district court action and counter-claimant against Isidor Farash.

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Opinion by 3rd Circuit Court of Appeals (Not Precedential) dated May 11, 2009 (07-3411) ..... APPENDIX-B

Farash & Robbins, Inc. ("F&R) and Isidor Farash ("Farash") hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this action on May 11, 2009.

STATEMENT OF JURISDICTION

The district court below had diversity jurisdiction pursuant to 28 U.S.C. § 1332 over the action alleging, inter alia, breach of contract, fraud and negligence. The District Court entered Final Judgment on or about July 17, 2007, dismissing, with prejudice, all of Plaintiffs claims, and entering judgment in favor of Defendant/Counterclaimant on its Counterclaim and Third Party Complaint.

Plaintiff timely filed a Notice of Appeal on August 13, 2007. The Third Circuit Court of Appeals had jurisdiction to entertain this appeal pursuant to 28 U.S.C. § 1291.

The U.S. Supreme Court has Jurisdiction to review all decisions of the federal courts pursuant to 28 U.S.C. § 1254(1) and as provided for by the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner Isidor Farash ("Farash") was owner of Farash & Robbins, Inc. ("F&R") a New Jersey Corporation, which in 1998 became a commercial borrower from Summit Capitol Corp., a New Jersey commercial bank. Farash was a limited personal guarantor of the loan. Between 1998 and 2001 two loan revisions were implemented, both raising F&R's credit line. In 2001 Summit Capitol Corp. was purchased by Fleet National Bank ("Fleet") and Fleet acquired the portfolio. In April of 2001 Fleet introduced its replacement loan officer, Robert Wainwright, who admitted at trial assuring Farash that the lending procedures would remain unchanged from the previous Summit relationship. Soon thereafter Farash noticed that his borrowing certifications ("BBC's") were being inaccurately calculated. Specifically, the collateral allowance was being wrongly capped at $625,000.00 rather then the $1.25-million provided for by the latest contract revision, executed about one year earlier in March, 2000[1]. Farash made three efforts to have this discrepancy corrected but the bank's new management was unresponsive. Eventually, in Oct. 2001, Farash politely refused to certify the inaccurate calculation and sent an incomplete borrowing certificate to the Fleet operations dept., with an attached letter suggesting they complete the form using their own data-base and deduct whatever money they deemed as owing, from the available

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[1] This discrepancy represented a significant downgrade in the credit limit from the previous contract revision.

cash in the borrower's checking account. Even though ample cash was available, Fleet did not do so. They did not address the letter or its contents at all. Soon thereafter the loan officer Robert Wainwright scheduled an early meeting at F&R's premises and brought his superior, the portfolio manager Jeff Dvorin. At the meeting Farash was again denied the contractually specified amount of credit and punished for complaining. Specifically, his contractually specified reporting requirements were accelerated from once per month with fifteen days grace period to five times per month with zero grace period. During depositions, Fleet's portfolio manager, Jeff Dvorin stated that a major reason for the increased reporting frequency was F&R's allegedly "over-advanced" position[2].

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[2] Page 54 of Dvorin's deposition:

Q At the meeting in October of 2001 you also asked Mr. Farash to report borrowing base certificates on a weekly basis rather than a monthly basis, correct?
A Correct.
Q Wasn't that request based upon their being an overadvance on the account?
A Not solely.
Q That was one of the factors, correct?
A That would have been a factor.
Q And that was a material factor that you based that decision on, correct?
MR. ATAMIAN: Object to the form.
A There were other factors that were equally as important.
Q What were the other factors?

(Cont'd)

Thus, the two reasons initially provided by the lender for the accelerated reporting requirements being demanded were: a) F&R's over-advanced position in Oct., 2001; b) The bank's desire to help F&R avoid <u>further</u> over-advances, which the bank later denied had ever been over advances in the first place and the district court agreed with.

Farash wrote two more letters in Dec. 2001 and Jan. 2002 complaining about the borrowing discrepancy. It was not until may of 2002 and after F&R had their lawyer intervene that Fleet finally agreed to abide by the contractual inventory-based sub-limits of $1.25-million. Fleet continued to refuse to abide by the contractually specified reporting schedule of once per month and further punished F&R for involving his lawyer by telling Farash to

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(Cont'd)

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A Reporting on a weekly basis it would smooth out the swings, it wouldn't be at month end to find out that he was overadvanced. Mr. Farash's business was heavily reliant on the cruise industry. The cruise industry subsequent to 9/11 was in serious shape. It would have made his life, I think, a lot easier to know where he stood on a weekly basis, as opposed to coming up on a month-end basis and being surprised.

Q Actually, Mr. Farash's company was never overadvanced prior to October 2001, correct?

MR. ATAMIAN: Object to the form, lacks foundation, argumentative.

A Based on his own borrowing base he was.

Q But based on the bank's records he wasn't, correct?

A Correct.

(Jeff Dvorin, 02-09-2004, pg 54, line 10 to pg 55, line 16)

"find another lender". The loan officer, Robert Wainwright promptly resigned from handling the F&R account, directly after F&R's attorney, Fred Biehl, Esq., called and wrote to him and after the correct amount of cash availability had been restored to F&R[3].

In August 2002, some three month after, Fleet concluded that the loan was weak due to returned merchandise being used for collateral and declared F&R in default.[4] Moreover, the lending contract then in force as well as the ongoing practices between the parties clearly permitted returned merchandise to be used as collateral[5]. The alleged default and the

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[3]
5 Q. Did there come a time when the relationship between
6 Fleet and Farash & Robbins became adversarial?
7 A. Yes.
8 Q. Do you recall when that was?
9 A. I don't recall the specific time. There came a time
10 when my attorney would be on the phone, and that pretty much
11 started it.

(Dvorin trial testimony TR452, lines 5-11)

[4] The final Fleet loan officer who declared F&R in default admitted that he understood the earlier demand for accelerated reporting requirements to be due to returned merchandise as of December, 2001 and January, 2002. The reporting schedule had been accelerated by Fleet months earlier, as of October, 2001.

[5] Loan officer Alberto Casasus affirmed:

1 Q. And do you recall having any discussions with him with
2 regard to the seasonality of the business?
3 A. Yes.
4 Q. Do you recall him indicating to you that after

Cont'd)

bank's declaration of same were encompassed within F&R's breach of contact claims against Fleet because F&R had denied that it had been in default.. Also, the bank's actions in placing F&R in default involved an abrogation of Fleet's earlier oral promises and assurances to continue administering the contract it had inherited from Summit without alterations. The trial court completely skipped over and never

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(Cont'd)

Christmas and Chanukah and the holiday season that there are certain returns?
A. Yes.
Q. And that would not be unusual for that type business; correct?
A. I would expect it to be.
Q. In fact, that's a common item with regard to asset-based lending is that a lot of the customers have returns; correct?
A. Not -- not necessarily. Not to that extent, no.
Q. To what extent?
A. Not to a very significant extent like Farash & Robbins had.
Q. So at this point in time, you had thought that the amount of returns that Farash & Robbins received were significant?
A. Yes, I did.
Q. Okay, and you calculated that into your formula in determining the eligibility of the borrower; correct?
A. Yes, we did.

(TR510, lines 22-24).

Most importantly F&R had not used returned merchandise as collateral anyway, even though it had the contractual permission to do so. Fleet's lack of honesty on this point is evidenced in the fact that loan officer Beyjoun had used an older, outdated and already replaced audit report, as the basis to issue his default. .

addressed this entire category of claims in its ultimate Opinion of 06-11-2007.

In Jan. 2003, F&R filed suit in New Jersey Superior Court against Fleet, alleging Common-law Fraud, New Jersey Consumer Fraud, Negligent Misrepresentation, breach of contract and breach of the implied New Jersey Covenant of Good Faith and Fair Dealing . The action was removed to New Jersey Federal District Court on the basis of diversity. Fleet denied the allegations and counter sued both F&R and Farash personally for breach of contract, essentially for not repaying the loan, and also claimed common-law fraud against Farash, as well as one count of conversion[6]. The Fraud claim against Farash accused him of fraudulently inflating the collateral that he had listed on the borrowing certificates and specifically through his including returned merchandise as collateral, one of the same reasons used by the last loan officer for declaring the default against F&R in August of 2002[7]. The

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[6] Farash also became a third-party litigant as a personal guarantor of the loan.

[7] Defendant Fleet subjected Farash to years of bogus claims of fraud, over an issue which was clearly permissible under the written terms of the loan and also clearly evidenced by the ongoing conduct of the parties. The bank's internal documentation showed that reserves and other offsets had been accounted for, in view of their anticipation that returns were regularly being processed.

The 3rd Circuit cited this same reason, namely collateral reliance on returned merchandise as a legitimate rationale for Fleet calling its loan at the end of 2002.

conversion claim merely attempted to create a legal prohibition against F&R continuing its normal business operations while in litigation with its lender. It is instructive to note that Fleet never sought to foreclose on its collateral, as it was contractually permitted to do[8].

During motion practice Fleet moved for and was granted dismissal of most of F&R's tort claims of Common-law Fraud and Negligent Misrepresentation. Farash moved for and was denied dismissal of Fleet's claims of common-law fraud and conversion. Prior to trial, Fleet moved for and was granted dismissal of F&R's remaining tort claim of New Jersey Consumer Fraud and was also granted partial summary judgment against F&R by limiting F&R's remaining "bad faith" claim to non-punitive damages. While F&R had initially demanded a jury trial, a later motion by Defendant Fleet sought to compel a bench trial.

Defendant Fleet's various weaknesses are elaborated more fully in Appellant's brief to the 3rd U.S. Circuit court. The points which directly pertain herein include: The fact that three Fleet auditors admitted at trial that it was their professional responsibility and obligation to police the accuracy of the Borrowing Base Certificates and to bring any mistakes to the attention of the borrower. Three loan officers also admitted that it was likewise the

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[8] A foreclosure would have required that the bank catalog the inventory and doing so would have revealed that no fraud by Farash had occurred.

bank's responsibility, along with the operations officer and even the portfolio manager. Loan officer Wainwright as well as operations officer Shea both admitted to not doing so, over approximately one year's time-frame while the BBCs were being inaccurately tabulated and submitted to Fleet as such, profoundly against the interest of the borrower, F&R.. Loan officer Wainwright even admitted knowing that the certificates were being repeatedly submitted inaccurately; moreover knowing that this mistake was costing the borrower hundreds of thousands of dollars in cash availability and he also readily admitted withholding this information from the borrower, while believing that the borrower himself was wrongly understanding (underestimating) his own cash availability Beginning on Page 108 of the trial transcript, Loan Officer Wainwright testified[9].:

20 Q. Mr. Wainwright, let's go to P-63 for identification.
21 A. Could you say that number again? I'm sorry.
22 Q. I'm sorry. Sixty-three.
23 A. Copy of a check?
24 Q. Correct.

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[9] A key piece of evidence which the 3rd circuit mentions in its decision is a photocopy of the check Farash handed to Fleet's loan officer to remedy an over-advance which he first admitted and later denied was an over-advance. Fleet's loan officer hand wrote: "Paydown to maintain formula" on the check copy later retrieved from Fleet's files. At trial, this loan officer asserted that there was no "formula" except as wrongly imagined in Farash's own head. But Farash had not written this notation, Fleet's Wainwright had. (See Appendix—C, 1-C)

Is that your handwriting on the bottom of – not

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on the check, but on the bottom, "Pay Down to Maintain Formula"?

A. Yes.

Q. What did you mean by that?

A. Just a paydown of the loan outstanding.

Q. Okay. But maintain what formula?

A. I don't know. I would assume that we took this check because he thought he was in an overadvance and this would put him back into formula. That would be the only reason why I would write that.

Q. Okay. And you must have thought the same thing, because you wouldn't take a check from somebody that wasn't overadvanced; right?

A. No, I take checks from my clients all the time who want to pay down their loans.

Q. Whether they're overadvanced or not?

A. It's a revolving line of credit. It behooves you to borrow less than more because then you don't pay the interest expense on it. That's the reason why we have people on monthly, weekly, daily.

Q. So if the borrower mistakenly – mistakenly believed
he was overadvanced, you would have taken the check anyway
is what you're saying?
A. A borrower hands you a check, you take it. There's an
old saying in banking: You spend half your day trying to

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find people to take your money and the other half trying to
get your money back.
Q. What about your 10th Commandment, to be truthful to
your customer?
A. What did I do that wasn't truthful? He wanted to pay
down his loan, and I accepted his check.
Q. But you said he was overadvanced, and he wasn't.
A. **I never said he wasn't overadvanced**.
Q. You never knew that he wasn't overadvanced?
A. No, **I said I never said he wasn't overadvanced**.

(TR109, lines 1-25, TR110, lines 1-10 / Emphasis added with **bold underline**)

The Circuit Court affirmed the District court's decision on this point, concluding that the written contract lacked the requisite specificity that the bank

must bring such mistakes, even though they be known by the bank, to the borrower's attention..

The Defendant's portfolio manager also admitted at trial that Farash had specifically requested the correct amount of borrowing and that he, on behalf of Fleet had refused[10]. To spite these clear admissions

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10

Q. Now, at this meeting in October of 2001, do you recall also having the conversation with Mr. Farash about him complaining about the inventory sublimit and that he wanted it increased?
A. I don't know if it was at that meeting, but I know that Mr. Farash complained about the inventory sublimit.
Q. And what was his complaint?
A. That it was too low.
Q. And that he wanted it increased?
A. Yes.
Q. And what did you tell him that he had to do if he wanted it increased?
A. That we would order an inventory appraisal and go based on what the inventory appraisal tells us.
Q. Didn't Mr. Farash indicate to you that he didn't need

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an appraisal because his loan agreement already indicated he was entitled to a million two-fifty?
A. But it indicated that he was entitled to, I believe, up to a million two-fifty.
Q. I'm sorry, Mr. Dvorin, I couldn't hear you.
THE COURT: Could you just keep your voice up a little bit?
Go ahead.
A. It indicates that it's up to that amount.
Q. And he indicated to you that he wanted the amount to be up to the million-two-fifty; right?
A. Correct.
Q. And you told him no without an appraisal; correct?
A. I believe so.

(Cont'd)

by the Defendant, the District court found that no such denial had ever occurred and the Circuit court affirmed on that issue as well.

The trial court ultimately found that no fraud had occurred by Farash against Fleet and that New Jersey law prohibited recovery on a conversion claim, while the party accused of this was merely continuing to conduct its ordinary business.

F&R's appellate brief also challenged the District court's decisions on the pre-trial dismissal of F&R's tort claims. Amazingly, the Circuit court disagreed with the legal conclusions reached by the District Court on this subject while affirming the District court's decision--based on fully opposite reasoning. The Circuit court concluded that since Plaintiff F&R had not prevailed on their breach of contract claims against Fleet, therefore, the denial of a trial on the

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(Dvorin Cont'd)

THE COURT: Well, wait. Didn't you just say that that's what it was: It was up to $1,250,000?
THE WITNESS: Right, but what the complaint was is that we were -- that we were limiting it, okay?
THE COURT: To below that.
THE WITNESS: To below that number. And we said we can only go up to that number.
THE COURT: Okay. And his complaint was that it shouldn't be up to but it should be --
THE WITNESS: It should be a million two-fifty.
Q. And you indicated to him, We're not going to go to a

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million two-fifty unless you have an appraisal; correct?
A. Correct.

(TR439, lines 11-25, TR440, lines 1-25, TR441, lines 1-2)

various tort issues became moot, because those same tort claims could not survive without F&R having prevailed on its breach of contract claims[11].

The District court had also concluded that Fleet had not breached the Covenant of Good Faith and Fair Dealing because it had not breached the contract.

F&R's tort claims addressed different events in different time-frames and with some of the basis for the claimed damage also being different from the breach of contract claims. F&R had no opportunity to argue the merits of these claims based on the facts of the case.

It is important to consider that the numerous sworn acknowledgements by Fleet's loan officers and auditors as to their responsibility to police the accuracy of the borrowing certificates and to report any discrepancies to the borrower is not simply a question of a oral contract superseding a written one. New Jersey law has long provided for oral contracts or alterations to written contracts be legally binding:

> "parties to an existing contract may, by mutual consent, modify it." Bohlinger v. Ward & Co., 34 N.J. Super. 583, 587 (App. Div. 1955), aff'd 20 N.J. 331 (1956).

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[11] The original reason for dismissing most of F&R's tort claims was that such claims were legally barred when filed together in tandem with corresponding contract claims, (re: "Economic Loss Doctrine") that were alleged to be legally overlapping in cause and damages.

> "The parties cannot be prevented from entering into a new contract, written or oral, by a pro-vision that a subsequent agreement not in writing shall not be binding." Headley v. Cavileer, 82 N.J.L. 635 (E. & A. 1912); Guizzette v. Katrek, 124 N.J.L. 461 (Sup. Ct. 1940); Lord Construction Co. v. United States, 28 F.2d 340 (CA 3, 1928); In Re Fleetwood Motel Corp, 335 F.2d 863 (CA 3, 1964); Sheyer v. Pinkerton Construction Co., 59 Atl. 462 (N.J. E. & A. 1904); Denoth v. Carter, 85 N.J.L.95 (Sup. Ct. 1913); Rizzolo v. Poysher, 89 N.J.L. 618 (E. & A. 1916), Fortunato v. Cicalese, 93 N.J.L. 461 (E. & A. 1919).

New Jersey courts have traditionally required "clear and convincing proof" in order to enforce oral contract modifications, which otherwise are expressly prohibited by the earlier written instrument. Homeowners Construction Company v. Borough of Glen Rock, 34 N.J. 305, 316-17 (1961).

However, the pertinent issue here is far more significant. What was roundly admitted to by Fleet's own witnesses was a universal term of service that applied to all Fleet borrowers in all situations. It was not just Fleet's job under this individual contract but was their admitted duty in handling all their

lending contracts and the proof was not only "clear and convincing", it was both admitted to and un-refuted[12].

Ms. Shea was responsible for performing the review procedure beginning in July, 2001. For months thereafter she checked and confirmed the accuracy of inaccurate BBCs, without bringing the same, repeated mistake to the attention of the borrower. In fact, following the earlier referenced meeting of Oct. 2001, Ms. Shea and Mr. Wainwright visited F&R specifically and exclusively to work with F&R's bookkeeper and V.P. on insuring the future accuracy of the BBC's.

Even then, with the BBC reports in front of them and the subject foremost on their minds and with the clients in the same room, both Shea and Wainwright

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[12] Loan officer Casasus:

5 Q. You had indicated that the borrower was responsible
6 for preparing the BBC; correct?
7 A. Yes.
8 Q. You would also agree that the bank was responsible for
9 reviewing the BBC; correct?
10 A. Yes.
11 Q. And they were responsible for making any corrections
12 on any inaccuracies; correct?
13 A. The bank's Operations Group, yes.

(TR638, lines 5-13)

Fleet operations officer Margaret Shea:

1 Farash & Robbins account, what did you do?
2 A. I had to take the first -- the first report that I got
3 from them was the July report, and I needed to do the
4 regular items on -- in my position. I had to check the BBC.

(TR387, lines 1-4)

failed to inform F&R of its repeatedly inaccurate sub-limitations on its inventory advance rate[13].

Thus, the bank oversaw and directed F&R's inaccurate BBC reporting for months after the famed Oct. 2001 meeting, without correcting or even mentioning this same, serially-repeated inaccuracy in F&R's sub-limits for its inventory advances[14].

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[13] (Ms. Shea confirms the meeting at F&R with its purpose)

10 Q. Ms. Shea, did there come a time when the borrower
11 began to submit weekly borrowing base certificates?
12 A. Yes. That was probably in October, maybe October, I'm
13 not exactly sure, of '01, shortly after we had a meeting
14 with Burt and Arun at Farash & Robbins.
15 Q. You attended a meeting with --
16 A. With Bob Wainwright and my supervisor. They wanted me
17 to go so I could meet Arun, and they would discuss how --
18 how we can get the reports so that they would be correct.
19 Q. And was Mr. Farash at that meeting?
20 A. No, he was not.
21 Q. Okay. Was there anything else discussed at that
22 meeting besides making sure that the information on the
23 monthly borrowing base certificate was correct?
24 A. Not that I recall.

(TR416, lines 10-24)

[14] Fleet auditor Merril Glazer:

11 Q. This is your examination report?
12 A. Yes.
13 Q. When you prepared this report, do you look at the
14 borrowing base certificates that the company has on hand at
15 that point in time?
16 A. Yes.
17 Q. And if you notice any discrepancy in the borrowing
18 base certificates, you would note it in your report?
19 A. Yes.
20 Q. Did you notice any discrepancy in the borrowing base

(Cont'd)

Fleet auditor Manuel Seiten also confirmed that the accuracy of the BBCs was the bank's job to police[15]. Fleet portfolio manager Jeff Dvorin also agreed[16].

There had not been a single molecule of contradictory evidence or testimony presented whatsoever. The Trial court merely held that as a matter of law, since this banking responsibility was

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(Glazer Cont'd)

21 certificates when you prepared this report?
22 A. I don't recall.
23 Q. Okay. But if there were any discrepancy, you would
24 have noted it on your report; correct?
25 A. Yes.

(TR1632, lines 11-25)

[15]
23 When you do your audit, do you look at the BBCs?
24 A. Yes.
25 Q. If you notice any errors on the BBCs, do you call that
1758
1 to the attention of the borrower?
2 A. Yes.

(Fleet auditor Seiten: TR1757, lines 23-25, TR1758, lines 1-2)

[16]
3 Q. Mr. Dvorin, you agree that the borrowing base
4 certificates should be reviewed by the loan officer each
5 month; correct?
6 A. Generally, yes.
7 Q. You also agree that if there's going to be -- strike
8 that.
9 You also agree that if there was an error noticed
10 on the borrowing base certificate, the loan officer should
11 notify the borrower; correct?
12 A. No, I think that probably comes out of the Operations
13 area.
14 Q. But somebody should notify the borrower; correct?
15 A. Correct.

(TR441, lines 3-15)

not specifically delineated in the written contract, therefore the obligation did not exist and the Circuit court affirmed.

Fleet portfolio manager, Dvorin first admitted during depositions and re-confirmed at trial that Farash had in fact requested the additional borrowing which F&R was entitled to, as specified in the lending agreement and Dvorin also admitted refusing Farash's legitimate request.

Loan officer Wainwright initially admitted during depositions that he had called Farash in Oct., 2001, had told Farash that the F&R account had been over-advanced and demanded a check to remedy the over-advance[17].

The net effect of these various decisions is that Farash, who had the well founded expectation that the bank, and certainly its auditors would be policing

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[17]
1 A The second meeting was a concern because Mr.
2 Farash's account was overadvanced.
3 Q Why was it overadvanced?
4 A Asset-based lending is based on lending versus
5 assets. We apply a formula to your accounts receivable
6 and your inventory. If either one of those numbers
7 drop, you could theoretically when you report in become
8 overadvanced.
9 Q How did you notify Mr. Farash that his
10 account was overadvanced? Did you call him on the
11 phone?
12 A I believe we told him on the phone and set the
13 meeting.
(Deposition of R. Wainwright dated 01-20-2004, page 16, lines 1-13)

the accuracy of the borrowing certificates had become convinced that F&R's credit line had been drastically reduced, as result of the Fleet acquisition, and in spite of the assurances to the contrary by the incoming Fleet management months earlier . It is also submitted that the various banks seeking to replace Fleet had drawn the same conclusion.

Even if such conduct by the lender seems reasonable, proper and legal, which Petitioner does not concede, this does not and can not address the fact that loan officer Wainwright even admitted that it was in fact his and the bank's job to bring such mistakes to the attention of the borrower. The Courts merely relieved Fleet of their admitted-to responsibility, based on their conclusion that general contract law does not support such universal service terms, which are understood and acknowledged as such by all parties, as being binding on those same parties in their ongoing actions under the contract.

REASONS FOR GRANTING THE WRIT

I. THERE IS NO PROVISION IN COMMON-LAW REQUIRING THAT TORT CLAIMS ARE SUBORDINATE TO CONTRACT CLAIMS.

Nor is any such provision even cited by the Third Circuit in its decision. In fact, neither the original defendant or the trial court even asserted such a defense. To hold that such a provision exists, a plaintiff could

not file claims of fraud or negligence without both filing and prevailing on other, breach of contract based claims. Clearly that is not the way that the U.S. Judicial System is configured or conducts its jurisprudence. Petitioner supplies no case citations on this point for the same reason that the 3rd Circuit supplied none in its opinion. The entire legal concept is procedurally abnormal.

II. THE ABJECT DENIAL OF A TRIAL ON THE FACTS ON F&R'S VARIOUS TORT CLAIMS CONSTITUTES A PATENT DENIAL OF THE CONSTITUTIONAL PROVISION GUARANTEEING DUE PROCESS OF LAW.

The Fifth Amendment of the United States Constitution provides as follows in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . .

The 3rd Circuit in its decision overlooked claims which had never been adjudicated as contract claims but nonetheless existed independently as part of F&R's tort claims. As one example, the final Fleet loan officer, Beyjoun, demanded a "landlord's waiver" be

provided to the bank in August, 2002. The Landlord's waiver provision appeared in the loan contract as a pre-condition of the first contract closing, some four years and two contract revisions earlier. This provision was not to be considered a "protective covenant" but a one time event which could only occur before the first loan had closed. Because this third-party document, essentially a release and subordination of the Landlord's rights was never in Farash's possession or under his control to produce.

When loan officer Wainwright took over the account in April, 2001, there was an unsigned "landlord's waiver" document as part of Fleet's legal files. Had it been signed, Beyjoun, the subsequent loan officer would not have later demanded this document and ultimately have not issued an official default against F&R, based on the absence of this executed contract. However, Wainwright admitted at trial that he had assured Farash in April of 2001 that such changes would not be imposed on F&R . On page 80 of the trial transcript, loan officer Wainwright, with regard to his initial meeting with Farash in April, 2001 testified:

21 Q. And you had indicated that you assured Mr. Farash that
22 there weren't going to be any changes?
23 A. That things would remain the same.

(TR80, lines 21-23)

F&R relied on this negligent misrepresentation and fraud in the inducement to keep his account at Fleet at the time it had been acquired from Summit. Yet, as of August, 2002, the next and final loan officer Beyjoun demanded a document which Wainwright should have considered before he earlier reassured Farash in April, 2001. The Third Circuit wrongly characterized these events. In its Opinion of 05-11-09 the Circuit Court wrote:

> "We may affirm the District Court's pre-trial dismissal of F& R's tort claims on different grounds than those on which the District Court relied . See Donahue v. Gavin, 280 F.3d 371, 372 n.2 (3d Cir. 2002) ("An appellate court may affirm a result reached by the District Court on different reasons ... as long as the record supports the judgment." (citations omitted)). Because F&R failed to establish that Fleet acted outside of the terms of the Loan Agreement, it is unable to establish, as the stated premise for its tort claims. that Fleet falsely represented that it did not intend to change the terms of the parties' agreement. Thus, the District Court's dismissal of F&R's tort claims was

appropriate."
(Page 13, "C" Opinion of May 11, 2009)

But the record does not support this judgment. In F&R's Second Amended Complaint dated March 6th, 2003, Second Count (Negligent Misrepresentation) the following claim is alleged:

> 51. In or around April 2001 as Summit Bank was transforming into Fleet Bank, a Fleet representative, Robert Wainwright, indicated to Farash that Fleet had no plans to change the terms of the existing relationship between Summit Bank and Farash. Specifically, as Mr. Wainwright visited Summit customers in anticipation of the transition, he indicated the visit was to assure them that the bank was going to maintain these existing relationships without change on a going forward basis and would remain stable. . .
>
> 53. Farash relied on the negligent misrepresentations made by Wainwright in deciding not to make arrangements with another commercial lender. . . .

(Plaintiff' F&R's Second Amended Complaint, page 11, dated March 6, 2003)

In view of the foregoing, the Third Circuit's Opinion on this subject lacks foundation. According to the 3rd Circuit Court of Appeals, the fore referenced Negligent Misrepresentation count was merely a verbal promise by Fleet not to breach their earlier, written contract with F&R. However, that was not what had been alleged in the Complaint or admitted to by the defendant Fleet. The Complaint had alleged that Fleet negligently reassured its acquired Summit clients that the working relationships would remain unchanged. Essentially, that the pattern of ongoing practice would remain stable and thus remain the continuing practice going forward.

It is alleged that Wainwright and Casasus critically and relevantly misrepresented on several levels. First, at the time this misrepresentation was made, Fleet's legal files were conflicted and incomplete. Their file also contained a conflicted contract, entitled "Second Loan Modification Agreement" dated March 27, 2000. A very important page had been dislocated from the contract in Fleet's possession. Fleet loan officer Alberto Cassasus stated at trial that he did not recall this critical page being retained as part of the official written loan agreement[18].

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[18] 14 Q. Mr. Casasus, would be good enough to go to the last
15 page of Exhibit P-221, please?
16 Do you recall ever seeing this document before?
(Cont'd)

When Fleet proceeded to litigation, they fully disowned this contract addendum, its contents and its entire legal meaning. Of course that would have to be their position since Loan Officer Beyjoun had earlier declared a default against F&R--based on the absence of this addendum to the remaining contract language. Farash had relied on the oral and written provisions provided him by loan officer Alberto Casasus, as to the loan's various "protective covenants". But Casasus admitted having discarded the addendum page and its

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(Casasus Cont'd)

17 A. Yes.
18 Q. Do you recall Mr. Farash sending you this document
19 with the loan documents that he had executed?
20 A. I remember him sending it to me. I don't recall if it
21 was with the loan documents or not.
22 Q. Well, if you go to the prior page, there is a
23 handwritten statement made underneath the signature;
24 correct?
25 A. Yes.

550

1 Q. It says Ref. Attached letter of understanding dated
2 10/7/98"; correct?"
3 A. Yes.
4 Q. And this loan modification was executed on the 13th;
5 correct?
6 A. Yes.
7 Q. And this was Mr. Farash indicating to you his
8 understanding of what the loan modification was about;
9 correct?
10 A. In his letter, yes.
11 Q. Do you recall the letter being attached to the loan
12 document?
13 A. I don't recall it being attached.

(TR549, lines 14-25, TR550, lines 1-13)

specific language, on the same day that he signed the contract. Casasus also admitted knowing that Farash had anticipated that the same addendum was going to be honored by the bank. .

This issue became part of F&R's untried negligent misrepresentation and New Jersey Consumer Fraud claims, because Casasus was present in the meeting of April, 2001, when Farash had questioned he and Wainwright about Fleet's intentions going forward. Wainwright wrongly answered Farash and also overlooked the multiple ambiguities in the loan contract, then in Fleet's possession and Casasus remained silent.

F&R's Second Count of Negligent Misrepresentation stated that F&R's damages resulted not from Breach of Contract but from F&R being negligently mislead about Fleet's go-forward intention regarding how the contract was going to be administered. Farash's question to Wainwright in April, 2001 would have made absolutely no sense if all he were asking was; if Fleet had intentions to breach their written contract with F&R. F&R had alleged that it had other lenders available at the time and/or, that other lenders would have been easier substituted when the negligent misrepresentations were initially made.

F&R also had voice recordings in its possession which were provided to Fleet during discovery, indicating that various Fleet employees admitted knowing upon its acquisition of Summit that the past practices and ongoing "relationships" would not be "maintained" and thus, would not "remain stable". These recordings were never played at trial but by the time of the trial, the tort claims relating to this Second Count of negligent misrepresentation, as well as the claims relating to fraud in the inducement had already been dismissed.

It is also undisputed that at the time of the negligent misrepresentation, in April, 2001, F&R's Borrowing Base Certificates had been inaccurately limited by $625,000.00.

Once Farash had questioned Wainright and Cassasus specifically regarding Fleet's plans going forward, the Bank's silence on this Borrowing Base subject became an element of F&R's Negligent Misrepresentation, Common-law Fraud and N.J. Consumer Fraud Counts, as distinguishable in cause, effect and damages, from F&R's Breach of Contract claims.

An entire section of F&R's Post Trial "Proposed Findings of Facts and Conclusions of Law" (filed April, 4, 2007) dealt with the merits of F&R's breach of contract claims,

vis-à-vis the many and varied actions of Fleet's final loan officer, George Beyjoun,. This section is titled "The August Breach" which begins at the top of page 45 (paragraphs 252 to 254) contained significant points which the trial court completely ignored in its Opinion. In addition to the landlord's waiver issue, the trial court never addressed the fact that Beyjoun also had placed F&R in official default, based on an older, outdated audit report, which had been entirely replaced with a newer audit report, months before the August, 2002 meeting.

The District Court may have had its reasons for bypassing and not addressing these allegations, as they related to F&R's breach of contract claims. However, it is respectfully submitted that the Circuit Court went a quantum step further in the wrong direction when it concluded that these same claims had been separately adjudicated and settled from a tort perspective.

Thus, the Third Circuit Court of Appeals utilized factual conclusions they deemed as having carried-forward from F&R's failed contract claims to retroactively decide the factual outcome and final disposition of F&R's yet untried tort claims. The tort claims had been dismissed prior to trial and most of them years prior, before discovery

had even closed[19].

It is further submitted that the F&R's other tort based claims were likewise entitled to due process and had thus been denied. The Third Circuit apparently concluded that the previous trial court's dismissals of those tort claims had been lawfully inadequate. Yet, they did not reinstate those claims. Judge Cavanaugh wrote in his Opinion of Feb. 13th, 2004 (page 18):

> The five elements of a fraud claim are:
> "(1) a material misrepresentation of a presently existing or past fact;
> (2) knowledge or belief by the defendant of its falsity;
> (3) an intention that the other person rely on it;
> (4) reasonable reliance thereon; and
> (5) resulting damages."
> Eli Lilly and Co. v. Roussel Corp., 23 F. Supp.2d 460, 491-92 (D.N.J. 1998).
> (District Court opinion, Feb. 13, 2004)

[19] General discovery closed on 04-01-2004 and the deadline for appointing of experts closed on 05-01-2004, while Judge Cavanaugh's Decision dismissing most of F&R's tort claims was dated 02-13-2004

Negligent misrepresentation is similar except that the offending party need not actually know that their faulty conveyances are false, only that the information being conveyed was in fact false when conveyed. Under New Jersey law, negligent misrepresentation is plead by alleging the following:

(1) Anyone negligently
(2) Providing false information to another
(3) Is liable in damages for injury
(4) Proximately caused to the other, or a foreseeable third person imperiled by, the other's reasonable reliance on the false information. .

Reynolds v. Lancaster County Prison, 325 N.J. Super. 298, 314, 739 A.2d 413, 422 (App. Div. 1999), certif. denied, 163 N.J. 394, 749 A.2d 368 (2000).

The New Jersey Consumer Fraud statutes even removes the customary requirement that the accused party have actually conveyed any false information. It can be successfully applied when the defendant is shown to have, through their passive omission, failed to provide necessary information they knew of and which was required for the plaintiff to conduct their affairs. Unlawful practices as defined by the legislation include three types of conduct: Affirmative acts, knowing omissions and

regulatory violations. The first two and thus the pertinent acts are prohibited in the clear language of N.J.S.A. 56:8-2.

> A practice can be unlawful even if no person was in fact mislead or deceived thereby.

D'Ercole Sales, Supra, 187 N.J. Super. at 470, 455 A.2d 508.

On the other hand, breach of contract is defined completely differently, as follows:

(i) A valid contract existed between the parties;
(ii) One of the parties breached the contract;
(iii) The other party preformed its obligations under the contract;
(iv) The non breaching party was damaged as result of the breach.

Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 275 F. Supp. 2d 543, 566 (D.N.J. 2003).

Therefore, F&R's contract claims are vastly distinguishable from its tort claims and must be tried independently. The damages which flowed from each set of claims is also different . In its decision, the Third Circuit Court of Appeals did absolutely no analysis of two necessary

questions: First, if all F&R's individual and specific tort claims could be decided based on the substance of the failed breach of contract claims, essentially, if they were legally interchangeable. Secondly, if the trial court had even addressed the specific breach of contract facts, which would then give rise to the future application of those findings-of-fact, retroactively to the outcome of F&R's untried tort claims--as adequate substitution for a trial.

F&R's Fraud and Negligent Misrepresentation claims allege that Fleet either knew and/or reasonably should have know that their assurances to the borrower in May, 2001 were impossible when made and additionally, were contrary to Fleet's established and ongoing practices with its acquired accounts.

Had Wainwright or Casasus correctly answered that Fleet still expected a "Landlord's Waiver" which provision the borrower reasonably believed Fleet had waived years earlier, F&R would have found a different lender, while doing so was a practical and viable option and before Fleet's further deleterious conduct had impeded F&R from attracting other lenders..

Had Cassasus mentioned in April, 2001, that he had first disregarded and then dislocated a critical page of the 2nd Revised Loan Agreement, or had Wainwright merely

mentioned that this page was then missing from the contract in Fleet's legal files, F&R would have found another lender. Minimally, the missing page could have been relocated from F&R's files and any discrepancies in the parties understandings ironed out.

The fourth count of F&R's Second Amended Complaint dealing with New Jersey Consumer Fraud stated in pertinent part:

> 65. He <Robert Wainwright> further represented that Fleet would not be looking to change the banking relationship and the loan agreement would remain unchanged. . . . Plaintiff was reasonable in relying on these falsehoods because they were made by vice presidents of defendant, who were also senior loan officers.

(Plaintiff's Second Amended Complaint dated March 6, 2003, Page 13, Paragraph 65)

The above claim is not a mere restatement of F&R's breach of contract claims. It deals with the stated intent of the lender at the time of the meeting and alleges that Fleet misrepresented and concealed its known strategy regarding the relationships and anticipated conduct between them and their newly acquired borrowers. The district court failed to address a variety of F&R's

claims, as they related breach of contract by Fleet. But even if the trial court had addressed everything from a contract perspective, petitioner submits that such a ruling would still be legally insufficient to retroactively erase F&R's tort claims.

F&R's Fifth Count of Common-Law fraud is substantially duplicative of its claim of N.J. Consumer fraud. In both cases, Fleet's fraudulent conduct gained them the advantage of keeping the clients they had purchased from Summit, whilst bringing those contracts into compliance with Fleet's own, far stricter strategic targets regarding collateral levels and types, personal guarantees and protective covenants. At the same time, Fleet would deny their local competition this revenue. On pages 592 and 593 of the trial transcript, loan officer Casasus specifically addresses this question:[20]

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[20]

12 Q. Now, Mr. Casasus, on or about March of 2001, there was
13 a merger announced between Summit Bank and Fleet Bank;
14 correct?
15 A. Yes.
16 Q. And you were employed on the Summit side; correct?
17 A. Yes.
18 Q. And at that point in time, was your employment with
19 Summit going to continue?
20 A. With Fleet, yes.
21 Q. Okay. And do you recall being in any meetings at that
22 point in time with regard to Fleet's position as to what it
23 was going to do with the customers that it was going to
24 inherit from Summit Bank?
25 A. I think there was one meeting we had where some Fleet

593

(Cont'd)

On page 573 of the trial transcript, loan officer Casasus explains the bank's reasons for agreeing to raise F&R's credit limits for a second time in March, 2000:[21]

Mr. Casasus also admitted being less then truthful with his borrowers. When questioned at trial about his conduct and honesty when dealing with borrowers, he admitted on page 662:[22]

F&R was an existing customer of Summit Bank and was still a <u>prospective</u> customer of Fleet Bank in April, 2001, when Wainwright and Casasus told Farash what they figured "he wanted to hear" regarding Fleet's intentions going forward. These false

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(Casasus Cont'd)

people came, and they basically were just looking to hold on to the business. They wanted us to be careful to not have -- or to try and hold on to all of the customers and not have anyone leave the bank.

(TR592, lines 12-25, TR593, lines 1-4)

[21] Q. Okay. Do you recall why you made a recommendation as to this credit facility being modified now for a second time?
A. I believe at this time the main reason why we were making the modification was because of some competitive pressures. There was another lender involved that Mr. Farash was speaking to, and they had basically extended an offer, and we were looking to keep the business.

(TR573, lines 1-8)

[22] A. There is some instances in which you tell the prospective customer more or less what he wants to hear.

(TR-662, lines 19-20)

assurances and specifically in April, 2001, the deliberate silence by Casasus was done in order to retain F&R as a Fleet borrower. It thus qualified as fraud in the inducement and should not be effected by the outcome of F&R's breach of contract claims.

Fleet's negligent misrepresentation and fraud in April, 2001 had the effect of facilitating the bank placing F&R in default on 30-minutes notice in August, 2002.

F&R's attorney Fred Beihl had even written a letter to Fleet in May, 2002 which sought an early meeting to address these potentially same open questions. Fleet never answered. Had Fleet wanted its money rather then the destruction of F&R, they would have welcomed such a meeting, rather then continuing to cause F&R to bleed-out financially, awaiting a time soon-to-come when they would spring a variety of new demands on F&R for documents which were never before required and moreover, outside F&Rs physical ability to produce.

Had Fleet acted honestly and in a commercially reasonable manner, F&R would have taken its business elsewhere, with a fresh contract and without the assortment of ultimately fatal ambiguities. F&R would today be viable and profitable, the courts would have saved at least fifteen days of its valuable time and Fleet would not have spent $4.5-million on legal expenses alone.

III. EVEN IF SUCH A PROVISION LEGALLY EXISTS, WHICH TIES THE FACTUAL OUTCOME OF CONTRACT CLAIMS TO THE VIABILITY OF UNTRIED TORT CLAIMS AND EVEN IF SUCH A LEGAL PATHWAY IS MERITORIOUS, ITS ENFORCEMENT IN THIS CASE CREATES UNDUE AND INEQUITABLE DISADVANTAGES ON THE PETITIONER.

Petitioner Farash and his business F&R were entitled to an unbiased and impartial fact-finder. This basic constitutional right was turned on its head when the fact-finder was faced with the choice between potentially being reversed on his earlier faulty dismissal of F&R's tort claims, versus retroactively washing those mistakes away through an unfavorable opinion of F&R on its contract disputes. The Third Circuit ruled that one outcome became retroactively contingent on the other. Thus, the fact-finder's impartiality was rendered compromised.

Loan officer Casasus again admits that his business dealings with Farash had not been entirely truthful:[23]

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[23] 12 BY MR. BIEHL:

(cont'd)

Hearing these various admissions, the trial court may have realized that its earlier pre-trial dismissals of F&R's tort claims had been premature. Judge Cavanaugh had himself earlier questioned Fleet's Jeff Dvorin[24] The fact-finder should not have

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(Casasus Trial Testimony Cont'd)

13 Q. With regard to the tape recording of your
14 conversation, Mr. Casasus, you wouldn't say something to
15 Mr. Farash in those conversations that would be untrue;
16 correct?
17 A. Mr. Biehl, just remember the context of the
18 conversations was, I was soliciting his business.
19 Q. I understand that; but my question for you is, you
20 wouldn't say something to him that was untrue; correct?
21 A. In the course of conversation? Perhaps.

(TR661, lines 12-21)

[24]
10 Q. And he indicated to you that he wanted the amount to
11 be up to the million-two-fifty; right?
12 A. Correct.
13 Q. And you told him no without an appraisal; correct?
14 A. I believe so.
15 THE COURT: Well, wait. Didn't you just say that
16 that's what it was: It was up to $1,250,000?
17 THE WITNESS: Right, but what the complaint was is
18 that we were -- that we were limiting it, okay?
19 THE COURT: To below that.
20 THE WITNESS: To below that number. And we said
21 we can only go up to that number.
22 THE COURT: Okay. And his complaint was that it
23 shouldn't be up to but it should be --
24 THE WITNESS: It should be a million two-fifty.
25 Q. And you indicated to him, We're not going to go to a

441

1 million two-fifty unless you have an appraisal; correct?
2 A. Correct.

(TR439, lines 11-25, TR440, lines 1-25, TR441, lines 1-2)

concluded that this alleged denial of contracted credit had never occurred. If the opinion of the 3rd Circuit on F&Rs tort claims is supported by the law, then the fact-finder became ineligible to decide the facts of the remaining contract claims and should have recused himself, at least as the fact-finder.

Therefore, the entire Decision and Order of the Trial court should be set aside and a new trial ordered on all issues decided by the fact-finder.

IV. IT WOULD PROFOUNDLY ALTER U.S. COMMON-LAW IF UNIVERSALLY ACCEPTED TERMS OF SERVICE THAT WERE ADMITTED TO BY THE ADVERSARY PROFESSIONALS WERE NOT ENFORCEABLE ON THEM UNDER CONTRACT LAW.

The trial court's conclusion as affirmed by the Third Circuit would, if allowed to become commonplace, set the stage for every imaginable absurd defense to prevail. Suppose that a bank had agreed in writing to provide daily international currency exchange rates but they did not specifically agree to provide those rates accurately or even honestly? The bank's witnesses could then, as they have done here, go onto affirm that they were in fact obliged to provide honest and accurate rates and data. The

trial court would then conclude that no liability existed because no such specific written obligation existed and the appellate court could, as they have done here, dismiss plaintiff's other claims involving negligence and fraud because the breach of contract claims were later found not meritorious under this above definition.

Fleet managed to convince the court that it never limited F&R's available cash below the amounts specified in the contract. However, it never denied that it was the bank's obligation to prevent such mistakes in the first place. The district court simply declared that the lending contract never specifically prohibited such conduct.

CONCLUSION

It is submitted that the courts below have "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." (Supreme Court Rules Rule 12(a) and 12(c))

Additionally, the trial court took a very harsh position against Farash interjected negative personal comments which were completely unnecessary for the matters it had at hand. Moreover, certain of the reasons cited by the trial court for its negative personal comments were insufficient to warrant the comments themselves. The trial court for example, characterized Farash

as a "difficult person" and provided the following reasons. The bench first reflected on the fact that Farash had used hidden recording equipment to keep records of various conversations he had with Fleet's employees. Except that doing so is lawful in New Jersey and such records are also generally admissible in court. Judge Cavanaugh also reasoned that Farash had sent a letter over the head of an executive at one of F&R's customers in May, 2002. The problem with that conclusion is that judge Cavanaugh's same decision and ruling also claimed that F&R and Farash had essentially lost that same customer nearly a year earlier, in the summer of 2001. (District Court's opinion 06-11-2007, page 7, footnote 4).

Both conclusions served different purposes although both were undeniably conflicted and both were unsupported by evidence. The sworn testimony of the only two witnesses clearly indicated that F&R continued shipping this same client until Oct., 2002, after loan officer Beyjoun declared the 30-day default, making it impossible for F&R to continue its normal operations. Fleet's default declaration of August, 2002 had been wiped off the "radar" by the District and Circuit courts. Petitioner has herein supplied numerous examples of evidence and testimony, especially by Fleet's own witnesses, which has been disregarded by the fact-finder. Numerous other such examples have been omitted for brevity. Collectively, these blatant inaccuracies rise to the level wherein the U.S. Supreme Court should respectfully consider intervening.

Fleet spent in excess of $4.5-million dollars in legal expenses alone, on a sadistic, flawed and ultimately failed effort to have Farash personally held liable for fraud, which was clearly permitted by the contract in its language and past practices and 'conversion' that was not defined as such by New Jersey law. The legal profession may be capable of survival and may even thrive under these conditions but it is respectfully submitted that every other profession can not and should not be expected to.

For all the above reasons it is respectfully requested that this court issue the petitioned-for Writ of Certiorari.

Lastly, petitioner kindly requests that the U.S. Supreme Court note that should it issue the Writ of Certiorari, petitioner would then retain a duly admitted attorney to proceed with the remainder of this proceeding. In the interim, Petitioner Farash requests that the United States Supreme Court provide any procedural latitude available to Farash as a pro-se petitioner. This Petition has been lengthy to provide both adequate and dramatic evidentiary contrast to the factual findings of the U.S. District Court.

Respectfully
Submitted:

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Appendix A — Opinion by Hon. Dennis Cavanaugh dated June 11, 2007 (03-cv-361)

FARASH & ROBBINS, INC.
Plaintiff(s),
-vs
FLEET NATIONAL BANK AS
SUCCESSOR OF SUMMIT BANK,
Defendant(s),
FLEET CAPITAL CORPORATION,
Counterclaim and Third Party Plaintiff,
-VS
FARASH & ROBBINS, INC, Counterclaim-
Defendant, and ISIDOR FARASH,
Third Party Defendant,

HONORABLE DENNIS M. CAVANAUGH
Civil Action. No. 03cv361(DMC)
OPINION
BENCH TRIAL INCLUDING FINDINGS OF FACT
AND CONCLUSIONS OF LAW

THIS MATTER was tried before the Court without the benefit of a jury on December 12, 13, 18--20, 2006 and January 3, 4 and 8-11, 2007. At the close of evidence, the parties were given ample opportunity to submit Proposed Findings of Fact and Conclusions of Law to assist the Court in its findings.[1]

The Court has received and reviewed the parties' submissions, the documentary evidence produced at trial as well as the full trial transcripts. The Court now renders its decision and findings pursuant to Federal Rule of Civil Procedure 52.

Based upon the following, the Court finds by a preponderance of the evidence in favor of Defendant-Counterclaimant and Third Party Plaintiff Fleet Capital Corporation and against Plaintiff and Third Party Defendant Farash & Robbins, Inc. and Isidor Farash.

THE PARTIES

Isidor Farash is the owner of Farash & Robbins, Inc., a New Jersey Corporation (F&R). F&R is engaged in the wrist watch business. F&R is an importer and wholesale distributor of wrist watches whose primary business is to sell wrist watches in the retail trade in the form of watch assortments. To create watch assortments, F&R grouped various watches into variety packages of approximately twenty--five or thirty-five pieces sold at the sane price for each watch, regardless of brand or model. F&R's largest customer from 1998 through 2002 was Starboard Cruise Services, Inc. (Starboard), an on-board cruise retailer.

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[1]As seen below, the Court has adopted a number of the proposed findings of fact and conclusions of law submitted by the parties.

Starboard sold F&R's watch assortments duty free aboard its customer cruise ships.

Defendant/Counterclaimant, Fleet Capital Corporation (FC) is the successor to Summit Bank with whom F&R, as borrower and Farash as guarantor, entered into a loan and security agreement to provide working capital to F&R.

CLAIMS

Plaintiff has sued Defendant for breach of contract and breach of the covenant of good faith and fair dealing. Defendant-Counterclaimant brings claims against F&R and Farash for breach of contract for the amounts owed by F&R under the loan agreement, breach of contract for amounts owed by Farash under the limited guarantee, conversion of the Schedule A collateral against F&R and Farash and fraud against F&R and Farash for conversion. of FC's loan proceeds.[2]

CREDIBILITY OF WITNESSES

With respect to the witnesses who testified, I found those who were presently or previously employed by the Bank (FC or Summit) to have been credible and truthful. Plaintiff based its case primarily on the testimony of Isidor Farash. I found Mr. Farash to be less credible and at times not believable. During his testimony there were several

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[2]This Court previously dismissed F&R's claims for negligent misrepresentation, fraud, and punitive damages by Opinion and Order, dated February 13, 2004, pursuant to FC's motion to dismiss. Furthermore, this Court granted FC ` s motion for summary judgment as to F&R's consumer fraud act claim (N.J.S.A. 56:8-2) , by Opinion and Order, dated December 16, 2005. In its December 16, 2005 Opinion, this Court denied F&R's summary judgment motion against FC in its entirety.

examples wherein he contradicted himself or testified differently than he testified previously or made statements that were contrary to statements made in prior filings.

FINDINGS OF THE COURT

F&R has brought suit against its lender (FC) claiming that due to FC's breach of contract F&R was literally driven out of business. Defendant-Counterclaimant on the other hand, takes the position that this is merely a straight forward case of F&R's failure to repay its loan of $1.5 million plus interest. F&R brought suit shortly after having drawn down the maximum amount available under the loan agreement.[3] F&R acknowledges that it has not repaid any

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[3]F&R, a vendor of watch assortments, has been wholly owned by Farash at all relevant times. In 1998, FC's predecessor, Summit Bank ("Summit"), F&R (borrower) and Farash (guarantor) entered into a Loan and Security Agreement ("Loan Agreement"), to provide working capital to F&R. F&R's availability under the Loan Agreement was determined under a "Borrowing Base" formula consisting of a percentage of F&R's "Eligible Accounts Receivable" and "Eligible Inventory." As collateral for the credit facility, F&R granted Summit a first priority security interest and lien on all of its property identified on Schedule A ("Schedule A Collateral"), including F&R's inventory. FC perfected its security interest in the Schedule A Collateral. The Loan Agreement was modified twice, pursuant to loan modification agreements, dated October 13, 1998, ("First Modification") and March 27, 2000, ("Second Modification"). The Loan Agreement, First Modification and Second Modification are collectively referred to herein as "Loan Agreement." The Second Modification (i) increased the maximum principal amount of the credit facility to $1,500,000, and (ii) modified the "Borrowing Base" to "up to (a) 80% of the Borrower's Eligible Accounts Receivable under 90 days from original invoice date ... plus up to (b) 50% of the value of the Borrower's Eligible Inventory ... on hand up to a maximum of $1,250,000 with respect to Eligible Inventory." In connection with the Second

(Cont'd)

portion of its loan or the interest due thereon since FC demanded repayment. It is FC's position that on or about October 21, 2002, when F&R refused to comply with its contractual obligations under the loan agreement, which included F&R's delay in allowing a mandatory field examination of its inventory and in submitting certain financial information, FC provided F&R with a 60-day notice of its intention to demand full payment of all sums due ($1.5 million plus interest). Faced with that demand, F&R responded by bringing this action several days prior to the expiration of the 60-day notice period.

When Plaintiff's business began to fail F&R brought this suit as a preemptive strike against Defendant claiming lender liability in that due to the fact that FC created difficulties in allowing Plaintiff to obtain monies it needed pursuant to the asset base lending agreement, Plaintiff was unable to keep its business afloat or expand with other potential customers.

The facts, amply demonstrated by the evidence, simply do not support Plaintiff's position. The facts demonstrate that the Bank loaned Plaintiff 100% of that which it agreed to loan, $1.5 million, and any problems that arose with the formula for

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(footnote 3 cont'd)

Modification, F&R executed and delivered a Revolving Line of Credit Note ("Third Note"), in the amount of $1,500,000., the maximum principal amount under the Loan Agreement, and Farash executed and delivered a Limited personal guarantee of up to $350,000 ("Limited Guarantee") FC is the successor in interest to Summit under the Loan Agreement, Third Note, and Limited Guarantee.

lending arose as a result of Plaintiff's own sloppy bookkeeping and its errors in submitting inaccurate Borrowing Base Certificates (BBCs) which were necessary to secure monies under the loan agreement.

Throughout the borrowing relationship, F&R was required to prepare, execute and submit Borrowing Base Certificates to Summit and, subsequently to, FC. The BBCs were sworn statements certifying the value of F&R's "Eligible Accounts Receivable" and "Eligible inventory."

F&R's available credit amount, at any given point, was determined by applying the Borrowing Base formula in the credit facility to F&R's "Eligible Accounts Receivable" and "Eligible Inventory," as reported in its BBCs. (See prior footnote 3).

Typically, Summit and FC provided standard form BBCs to their borrowers.

In entering into its asset loan agreement with the Bank, F&R agreed that depending upon the amount of its inventory and accounts receivable, a formula would be created whereby it would receive loans to run its company. The formula provided that Plaintiff would be able to borrow up to 50% of the value of its inventory not to exceed $1.25 million (ultimately raised to $1.5 million). However, on the BBCs submitted by Plaintiff to the Bank, Plaintiff's bookkeeper entered one-half that amount thereby theoretically reducing the amount of the potential loan from $1.25 million to $625,000.00. in other words, the Bank would loan F&R monies as long as F&R could demonstrate proper collateral through BBC reporting and inventory. Although it was clear

from the evidence that it was Plaintiff's error or that of its bookkeeper, Plaintiff is now attempting to place fault on Defendant in not picking up or observing the mistake on the BBC and advising Plaintiff of its own error. It should also be noted that Farash himself signed off on the BBCs on a regular basis giving him the opportunity to correct the mistake. Plaintiff is attempting to place a burden on the Bank that does not and should not exist.

FC also correctly argues and the evidence supports, that even if Plaintiff were correct in its claim, and the Bank could somehow be found at fault for Plaintiff's mistake, nevertheless FC did indeed loan Plaintiff the total amount that was sought under the agreement anal therefore would not be liable for any alleged problems that Plaintiff encountered in its business.

Plaintiff does not dispute that the bulk of its business, approximately 80%, was with its main customer, Starboard.[4] The evidence showed that

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[4] Notably, F&R, which had lost many of its major accounts by 2001, had already experienced a major deterioration in its business relationship with Starboard (its paramount customer) prior to September 11. In 2000, Starboard (then known as Greyhound Leisure Services) was acquired by LVMH Moet Hennessy Louis Vuitton ("LVMH"), and became known as Starboard Cruise Services, Inc. At trial, Farash acknowledged that, following the LVMH acquisition, there was a failure of communication between Farash and Starboard's new management. Starboard's new management examined market trends and concluded that it had become more difficult to sell the large number of "promo watches" that the company had sold in the past. Starboard management

(Cont'd)

after the 9/11 attacks on the World Trade Center, the travel industry became depressed. Since Plaintiff's business was selling assortment watches on cruise ships and since the cruise ship industry suffered after 9/11, it is not surprising that Plaintiff's business would also suffer. Furthermore, Starboard changed the way it conducted its business with Plaintiff by way of returning more of its product as unsaleable, taking Longer to pay Plaintiff for goods purchased, and slowing down some orders that it placed previously for future delivery, all factors that adversely impacted Plaintiff's cash flow and business in general. This helped cause an erosion of the relationship between F&R and Starboard. Eventually, for reasons having nothing to do with FC, Plaintiff lost Starboard as a customer completely.

While Farash attempts to blame his failed business on actions of FC's employees, the testimony and evidence educed fails to support such claims. On the contrary, it was Mr. Farash's conduct or market trends that created F&R's

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(footnote 4 Cont'd)

recognized that its business model had changed because customers now wanted to buy recognized brands rather than "promo watches." Starboard stores began to advise Starboard management that non-widely recognized brands were more difficult to sell and that, accordingly, they needed more recognized brand watches. Accordingly, the relationship between Starboard anal F&R had significantly deteriorated prior to September 11.

problems.

First, as mentioned above, the errors on the BBCs were created by F&R. Although Mr. Farash claims that the demands made by FC were improper or in violation of the underlying contract, the Court finds just the opposite to be true. When the original contract was entered into, it was understood that there would be monthly BBCs which would allow F&R additional borrowing up to its limits.

Due to irregularities in the BBCs filed by F&R, and the conduct of Mr. Farash in dealing with employees at FC, pursuant to the contract FC demanded weekly rather than monthly BBCs. The evidence supports FC's position that FC routinely sought weekly and sometimes daily reporting from its borrowers. Furthermore, the loan agreement itself expressly authorized FC at its discretion to request additional financial information from F&R. As stated above, the evidence amply demonstrated that it was the loss of Starboard's business which decimated F&R rather than FC's requests for more frequent financial reports in the form of weekly BBCs.

Regarding F&R's claims that FC was responsible for F&R's failure to gain a licensing or sales agreement with PUMA and/or FILA, there is virtually no evidence to support such a claim.

With respect to PUMA, there was evidence that Mr. Farash had several conversations with a friend who allegedly had contacts with PUMA. There is no evidence that the Bank did anything to harm Plaintiff's potential relationship with PUMA since

at best Plaintiff was merely testing the waters to see if it could find a new client, however nothing came of it.

With respect to FILA, again while Mr. Farash did enter into discussions with FILA to expand FILA's vendors, F&R refused to be bound by the "take it or leave it" contract submitted by FILA. Furthermore, testimony revealed that FILA was attempting to distribute its products to high end stores such as Nordstrom's and Bloomingdale's, establishments where Plaintiff did not sell. After Plaintiff received the aforementioned contract, Farash wrote back to the representative of FILA with a somewhat nasty note making it clear that he would not enter into such an agreement. Since FILA would not negotiate or change the terms of its proposed agreement, the discussions ended. Again, this failed endeavor had nothing to do with Plaintiff's ability or inability to borrow more money from FC. F&R simply could not abide by the demands of FILA.

It should also be noted that Mr. Farash is a rather difficult individual. He surreptitiously tape recorded telephone calls and meetings of representatives from FC without their knowledge. He also made things difficult with respect to the submission of BBCs. Finally, he refused a timely inspection of F&R's premises so the bank representative could review and check inventory, something the Bank had every right to do under the contract. Furthermore, in his business dealings with his customers and the Bank employees he was argumentative, sarcastic and on more than one

occasion when not satisfied with his dealings with representatives at one level, Farash went over their heads to their superiors thus creating more tension and difficulty in his business dealings. On May 11, 2002, Cusick sent Farash a pointed e-mail stating that:

> I just received an e-mail from Ed informing me of your call. Dory (Farash), suffice to say, I am surprised and disappointed that you have chosen such a tact. I feel that this is very unprofessional and totally uncalled for. Ed is much to busy to get involved in such a level of detail. your call to him has insinuated that you do not have confidence and respect enough in the management of Starboard, specifically myself, Pam and Rob to work through our mutual challenges. I am very disappointed. . . I do not think this "behind the scenes" "end round" "cheep shot" tact will do anything but undermine the goal of establishing a successful business. You really blew it . . .

Starboard was a loss from which F&R could not recover.

Since the Court finds that there is no liability upon FC, a detailed discussion of damages is not necessary. Suffice it to say however, because the evidence demonstrates that F&R's purported business opportunities were highly speculative, any damages sought for lost or anticipated profits would certainly also be speculative. "Profits which are

largely speculative, as from an activity dependent on uncertain or changing market conditions, or on chancy business opportunities, or on promotion of untested products or entry into unknown or unviable markets, or the success of a new and unproved enterprise, cannot be recovered. Factors like these and others which make a business venture risky in prospect preclude recovery of lost profits in retrospect." PFI, Inc. vs. Kulis, 363 NJ Super. 292, 301(App. Div. 2003).

In addition, during his testimony, Farash admitted that his opinions regarding potential profits were arbitrary and merely what he thought as opposed to anything with a basis in fact. His testimony regarding damages was largely unsupported.

Accordingly, since F&R offered no evidence in support of anything but highly speculative damages, no damages could be awarded.

The Defendant's witnesses were credible and believable. They were bank employees who were doing their best to oversee loans. This vas their job. As stated above, Plaintiff was somewhat uncooperative. Also, due to its inventory methods, it was very difficult to obtain an accurate count of its product other than twice a year when a hands-on inventory review occurred. Therefore, it was reasonable that the Bank would seek further information from Plaintiff regarding its supposed inventory claims. The bottom line is that the BBCs submitted by Plaintiff were inaccurate due to among other things the type of inventory analysis that Plaintiff conducted.

The Court also finds that Plaintiff attempted to

obtain other sources of funding, however F&R did not do so or would not do so since FC was affording F&R a better financial arrangement. Plaintiff also had an opportunity to borrow from the Small Business Association (SBA) but chose not to do so because Farash did not wish to encumber other personal. properties. The SBA, in an effort to assist small businesses in the aftermath of 9/11, offered loans at favorable rates.

Therefore, while other sources of funding or loans were available, Plaintiff chose not to pursue those sources.

Because F&R has failed to establish any damages related to or caused by FC's conduct, F&R's breach of contract claim falls.

As stated above, the evidence amply demonstrates that FC did not violate the covenant of good faith and fair dealing because it did not reduce the inventory supplement it had agreed to and in requesting that F&R submit weekly BBCs following September 11, FC exercised its contractual right to require such additional financial reporting and it did so in good faith.

The Third Circuit explained the applicable standard under New Jersey law

> While the "principle of fair dealing pervades all of [New Jersey] contract ... [t]hat principle will got alter the terms of a written agreement." Rudbart v. North Jersey District Water Supply Comm'n,127 N.J. 344, 605 A.2d 681, 692 (1992). "The implied duty of good faith and fair dealing does not operate to alter the clear terms of

> an agreement and may not be invoked to preclude a party from exercising its express rights under such an agreement" Fleming Cos., Inc. v. Thriftway Medford Lakes, Inc., 913 F. Supp. 837, 846 (D.N.J. 1995) (citing Glenfed Fin. Corp. v. Penick Corp., 276 N.J. Super. 163, 647 A.2d 852, 858 (1994). So, where the terms of a contract are not specific, the implied covenant of good faith and fair dealing may fill in the gaps where necessary to give efficacy to the contract as written. *But where the terms of the parties' contract are clear, the implied covenant of good faith and fair dealing will not override the contract's express language.*

Fields v. Thompson Printing Co., 363 F.3d 259, 271-72 (3d Cir. 2004) (emphases added).

Similarly, F&R adduced no evidence that FC in requesting weekly BBCs, had any bad motive or intention which is a necessary element in maintaining a claim for breach of the covenant of good faith and fair dealing. See Wilson v. Amerada Hess Corp., 168 N.J. 236, (2001). Here, the evidence shows that Robert Wainwright, the FC Loan officer who requested the change, believed the submissions of weekly BBCs would actually assist F&R by improving cash flow and reducing borrowing costs with accumulated interest.

Due to the fact that the evidence demonstrates that FC acted in good faith under the contract, F&R has not set forth evidence to support its claim for

breach of the covenant of good faith and fair dealing.

With respect to the counterclaims, there is no question, and the Court so finds, that FC loaned F&R $1.5 million along with anticipated interest, and F&R has failed to repay any of the outstanding balance since requested by FC in October of 2002. Farash signed as a guarantor on the loan. Both of these facts were admitted to by Farash during his testimony at trial. These are undisputed facts.

In addition, FC contends that F&R and/or Farash breached the contract which existed between Plaintiff and Defendant; that FC performed .its obligations under the contract; and that FC was damaged as a result of F&R anal/or Farash's breach. The Court finds that a valid contract existed and that FC performed its obligations under the contract which was breached by F&R and Farash. FC is entitled to prevail because the evidence at trial demonstrated that it acted reasonably and in good faith in exercising its contractual rights and that F&R and Farash breached the contract.

The evidence also amply supports FC's claim that Farash breached the limited guarantee he previously entered into.

It is well settled law that the interpretation of a limited guarantee is a matter for the court and when its terms are clear and unambiguous, the court should enforce the terms as written. Center 48 Ltd. Partnership v. Mav Department Stores Co., 355 N.J. Super. 390 (App. Div. 2002).

As stated above, Farash acknowledged that he executed a limited guarantee in which he "absolutely, unconditionally, and irrevocably" guaranteed the

payment for up to $350,000 owed by F&R to FC. Since the evidence established that F&R has defaulted under the loan agreement, and FC provided Farash of notice of its demand for payment to FC, and such payment was not made, Farash is liable to FC for any portion of the $350,000 owed under the limited guarantee. Accordingly, as a result of the facts adduced by FC at trial., FC is entitled to prevail against Farash for breach of the limited guarantee. The Court so finds by a preponderance of the evidence.

As security for payment of amounts due under the loan agreement, F&R executed and delivered a continuing security interest in the Schedule A Collateral which included F&R's inventory. Farash acknowledged at trial that subsequent to F&R's default, instead of maintaining the inventory which was collateral, F&R and Farash elected to dissipate such inventory. As a result, FC seeks to hold F&R and Farash liable for conversion.

Under New Jersey Law, conversion is "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." Slowinski v. Valley National Bank, 264 N.J. Super. 172, 189 (App. Div. 1993).

Where an officer of a corporation exercises ownership rights over property designated as security for a loan agreement to the exclusion of the .lender's rights, this conduct constitutes conversion, and that officer is personally liable for the loss. Glenfed Fin. Corp. V. Penick Corp.., 276 N.J. Super.

163, 181-82 (App. Div. 1994).

There is little doubt that Farash did indeed dissipate or sell off his inventory. However, the asset loan agreement that F&R entered into with FC contemplated an ongoing fluid relationship wherein loans would be made based upon a formula which took into consideration inventory value, recognizing that the inventory would come and go. There was much testimony during trial regarding the methods used to determine anal report inventory. The Bank understood that the method used by F&R was somewhat of an estimate rather than a precise count.[5] When Farash felt the Bank was creating difficulties and in effect throwing up road blocks to his ability to borrow further, the relationship between him and his company and the Bank and its employees and loan officers began to sour. The nature of the business and the depletion of inventory in order to keep the business afloat was understood by all. The evidence adduced indicates that there has been no diversion of funds and no secretion of collateral during the term of the contract. In fact, the evidence supports F&R's argument that it operated its business during the term of the loan and deposited all funds in the F&R company account.

Furthermore, Fleet has not established an immediate right of possession to the funds or collateral at issue, such as a fiduciary relationship. "it is essential that the money converted by a tort feasor must have belonged to the injured party." Commercial Ins. Company of Newark vs. Apgar 1.11

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[5]F&R had no "perpetual" Inventory system in place and therefore relied upon a 'roll forward' method to obtain current value.

NJ Super. 108, at 114 (1970). FC's appropriate remedy sounds in contract. Accordingly, the Court is not satisfied that FC has proven its conversion claim by a preponderance of the evidence and therefore finds in favor F&R and Farash on this point, Finally, FC charges fraud by F&R and Farash in that they falsely reported the borrowing availability under the credit facility. As this Court previously recognized in its February 13, 2004 Opinion at page 9 (quoting Eli Lilly and Co. v. Roussel. Corp., 23 F. Supp. 2d 460, 491-92 (D.N.J. 1998); Gennari v. Weichert Realtors, 148 N.J. 582, 610 (1997) "The five elements of a fraud claim are: (1) a material misrepresentation of a presently existing or past fact, (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon; and (5) resulting damages".

In order for this Court to find that F&R and/or Farash committed a fraud, it would have to be satisfied that there was an intentional overstatement of the value of the F&R inventory to support the fact that F&R borrowed funds which it was not entitled to under the credit facility. As stated above, the inventory figures submitted by F&R were material because F&R's borrowing was on 50% of the value of it "eligible inventory" to a maximum of $1,250,000. "Eligible inventory" was merely that which had value and could be used as collateral. In other words, inventory that was broken, used or otherwise of questionable value would not be considered eligible. FC claims that F&R artificially inflated its borrowing availability under the BBCs by misclassifying as "eligible inventory" goods worth in excess of $400,000

that should have been designated "ineligible inventory". While the description of the inventory is important and certainly relevant to F&R's borrowing ability, the classification of the inventory is subject to interpretation.

As counsel for F&R and Farash correctly points out in its post-trial submissions, not every potential mistake could or should be construed as "fraud". Honest mistakes were certainly a possibility.

Fleet has failed to prove false representations of material facts were made in the borrowing base certificates. As stated above, the BBC's were completed pursuant to the roll forward method of inventory which was well known to Fleet as an inexact method of inventory calculation since it relied upon historical data. The Courts finds that neither representatives of F&R nor Farash intentionally tried to deceive Fleet in its financial reporting. Accordingly, since the elements necessary to support a fraud claim have not been met by a preponderance of the evidence, FC's claim for fraud must fail and the Court finds in favor of F&R and Farash on this issue.

During the course of trial, the parties sought and the Court reserved decision on motions for a directed verdict pursuant to F. R. C. P. 52 (c) . The Court has now had an opportunity to review the matter in its entirety and those motions wherein the Court reserved decision are **denied**.

CONCLUSION

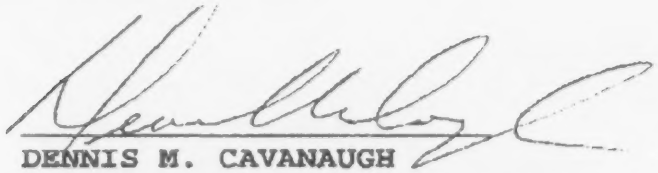
Counsel for Defendant-Counterclaimant is directed to submit an appropriate form of Judgment.

pursuant to Rule 58 consistent with the findings contained in this opinion in favor of Defendant-Counterclaimant, including interest and allowable costs of suit.

Dated: June 11, 2807

CC: All Parties

Ron. Mark Falk, U.S.M.J.



DENNIS M. CAVANAUGH
United States District Judge

Appendix B — Opinion by 3rd Circuit Court of Appeals dated May 11, 2009 (07-3411)

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 07-3411

FARASH & ROBBINS, INC.

v.

FLEET BANK, f/k/a SUMMIT BANK; SUMMIT BUSINESS CAPITAL CORP.; FLEET CAPITAL CORPORATION;

v.

ISIDOR FARASH

Farash & Robbins, Inc.; Isidor Farash, Appellant

On Appeal from the United States District Court

for the District of New Jersey

(D.C. No. 03-cv-361)

District Judge: Honorable Dennis M. Cavanaugh

Submitted Under Third Circuit LAR 34.1(a)

February 6, 2009

Before: McKEE, JORDAN, and LOURIE*, Circuit Judges.

(Filed: May 11, 2009)

*Honorable Alan D. Lourie, Circuit Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

OPINION OF THE COURT

JORDAN, *Circuit Judge.*

Farash & Robbins, Inc. ("F&R") and Isidor Farash appeal the judgment of the United States District Court for the District of New Jersey against them and in favor of Fleet Capital Corp. ("Fleet") in the amount of $4,498,051.40 and $350,000.00, respectively.

F&R's Second Amended Complaint alleged five counts against Fleet: breach of contract, negligent misrepresentation, breach of the covenant of good faith and fair dealing, consumer fraud in violation of the New Jersey Consumer Fraud Act, N.J. Stat. Ann.§ 56:8-2 ("CFA"), and common law fraud.[1]

Those claims all arose out of a loan agreement (the "Loan Agreement") between F&R and Summit Bank ("Summit"), Fleet's predecessor in interest.[2]

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[1]F&R's earlier complaints are not relevant to this appeal. For simplicity, we will refer to F&R's Second Amended Complaint as its "Complaint."

[2]The identity of the correct defendant in this case was a contested issue, in part because Summit and Fleet entities merged about a year after the parties here finalized the Loan Agreement. The District Court determined that the merger made Fleet successor in interest to the Loan Agreement and the proper defendant in the case, a holding that the parties do not dispute on appeal.

Fleet filed counterclaims for breach of contract, conversion, and fraud, along with a third-party complaint against Farash, the owner of F&R, for breach of contract (as guarantor to the Loan Agreement), conversion, and fraud. The District Court dismissed F&R's negligent misrepresentation, CFA, and common law fraud claims before trial. Following a bench trial, the District Court ruled against F&R on its claims for breach of contract and breach of the covenant of good faith and fair dealing, holding that Fleet had not breached the Loan Agreement and had acted in good faith in its dealings with F&R; the Court also ruled in favor of Fleet on its breach of contract claims.[3] See Farash & Robbins, Inc. v. Fleet Nat'l Bank ex rel. Summit Bank, No. 03cv361, 2007 WL 1686702 (D.N.J. June 11, 2007).[4] For the following reasons, we will affirm the District Court's judgment.

I. Background

A. The Parties' Relationship

Because we write primarily for the parties, we only describe those facts that are necessary to our decision. Pursuant to the Loan Agreement, Summit agreed to provide F&R a revolving line of credit with a maximum principal amount of, ultimately,

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[3] The District Court's judgment states that it was "dismissing with prejudice all of F&R's claims against [Fleet]." The Court's opinion makes clear, however, that it decided F&R's breach of contract and breach of the covenant of good faith and fair dealing claims on the merits.

[4] The court also held that Fleet's conversion and fraud claims lacked merit. *Id.* at *6-8. Fleet did not appeal that determination.

$1,500,000 for working capital.[5] In addition to the $1.5 million cap, the revolving line of credit was limited to F&R's "Borrowing Base." The Loan Agreement defined F&R's Borrowing Base as "(a) 80% of [F&R's] Eligible Accounts Receivable ... plus up to (b) 50% of the value of [F&R's] Eligible Inventory ... up to a maximum of $1,250,000.00 with respect to Eligible Inventory."[6] (App. at 759.) Farash personally guaranteed F&R's obligations under the Loan Agreement up to $350,000 (the "Limited Guarantee").

The Loan Agreement required F&R to submit to Summit (and later to Fleet) monthly Borrowing Base Certificates ("BBCs"), which were to include information relating to F&R's line of credit, such as its Borrowing Base. Summit, and later Fleet, provided blank BBC forms for F&R to complete, certify, and submit. These forms required F&R to note its negotiated Borrowing Base formula on designated lines.

If F&R were to default on the Loan Agreement, Fleet was authorized to increase the interest rate on F&R's loans by 5%. The Loan Agreement also required F&R and Farash to pay Fleet's attorneys' fees and costs following an F&R default. An F&R default was defined to include the nonpayment of any payment due.

Leading up to the merger between Fleet and Summit, Robert Wainwright, a loan officer from Fleet, assured Farash that the Loan Agreement would remain unchanged. In June of 2001, however,

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[5]The Loan Agreement was amended twice. Only the final version is relevant to this appeal.

while reviewing F&R's financial documents in connection with a licensing opportunity, Farash allegedly discovered that the BBCs contained a mistake in the Inventory Sublimit of the Borrowing Base, listing it as $625,000 rather than the $1,250,000 allowed by the Loan Agreement

One might expect that Farash would have brought the erroneous Inventory Sublimit to the bank's attention, but apparently he did not. To the contrary, he included a letter with the September 2001 BBC stating that F&R was overadvanced on its credit facility, though ready and able to pay it down. The only reason for the overadvance, however, was that the Inventory Sublimit was incorrectly listed as $625,000. Had the Inventory Sublimit been listed correctly, the BBC would have indicated that F&R had over $400,000 of credit still available.

In October 2001, Farash met with Wainwright and Wainwright's supervisor, Jeff Dvorin. At the meeting, Farash gave Wainwright a check for $100,000. Wainwright recorded that the check was a "paydown to maintain formula." He accepted the check even though the bank's internal report indicated that F&R had $419,909 available on its line of credit.

At the same meeting, Wainwright and Dvorin told Farash that F&R needed to begin submitting weekly, rather than monthly, BBCs. F&R alleged that the weekly BBC requirement reduced its cash availability, created an increased workload for F&R, and made it difficult for F&R to forecast its cash requirements. Adding to the company's difficulties,

F&R alleged that Fleet was unwilling to change the Inventory Sublimit on the BBCs until May of 2002. By that time, however, F&R's outstanding loan balance had nearly reached the absolute limit of $1.5 million.

At the same time, the relationship between Wainwright and Farash had become strained. In August, Dvorin assigned George Beyjoun to the F&R account, to replace Wainwright. After an initial review, Beyjoun concluded that F&R's inventory reporting was "weak" because F&R "ha[d] no perpetual inventory and use[d] the [gross profit] margin to roll forward."[7] (App. at 1607 112.) Beyjoun additionally noted that the "roll forward calculation [was] not being submitted" and that the "inventory makeup [was] weak due to large returns and watches to be refurbished." (Id.) Subsequent correspondence from Fleet to F&R indicated that F&R refused to allow Fleet to conduct an "examination of the collateral." (App. at 1608 113.)

On October 21, 2002, Fleet demanded payment "in full of all obligations due and owing under the Loan Agreement" within sixty days. (App. at 1608 115.) F&R filed this lawsuit shortly before the sixty

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[7]By using "roll forward" reporting, F&R would use its historic gross profit margin to estimate the value of its inventory. In other words, for its Eligible Inventory, F&R would report to the bank the anticipated value of the inventory, as measured by what F&R charges for its products, after deducting its anticipated gross profit margin. Thus, any uncertainty in the variables, including the anticipated gross profit margin, would limit the accuracy of F&R's inventory calculation.

days expired.

B. Procedural Background

Following its pretrial dismissal of F&R's negligent misrepresentation, CFA, and common law fraud claims, the District Court conducted a 10-day bench trial on F&R's breach of contract claims and Fleet's counterclaims and third-party claims. At the conclusion of trial, the District Court issued its findings of fact and conclusions of law.

The Court prefaced its opinion by noting that it found Fleet's witnesses more credible than Farash. 2007 WL 1686702, at *1. The Court then found that "the Bank loaned Plaintiff 100% of that which it agreed to loan, $1.5 million, and any problems that arose with the formula for lending arose as a result of Plaintiff's own sloppy bookkeeping and its errors in submitting ... Borrowing Base Certificates ... which were necessary to secure monies under the loan agreement." Id. at *2. Specifically, the Court found that "on the BBCs submitted by Plaintiff to the Bank, Plaintiff's bookkeeper entered one-half [of the Inventory Sublimit,] thereby theoretically reducing the amount of the potential loan from $1.25 million to $625,000.00." Id. Furthermore, "Farash himself signed off on the BBCs on a regular basis giving him the opportunity to correct the mistake." Id.

The Court also found that Fleet "routinely sought weekly and sometimes daily reporting from its borrowers," id. at *3, that the "BBCs submitted by Plaintiff were inaccurate due to among other things the type of inventory analysis that Plaintiff conducted," id. at *5, and that Wainwright "believed

the submissions of weekly BBCs would actually assist F&R by improving cash flow and reducing borrowing costs with accumulated interest." Id.

Based on those findings, the District Court held that Fleet did not breach the Loan Agreement. Id. at *5. According to the Court, Fleet was not obligated to correct F&R's mistake with respect to the Inventory Sublimit. The Court also held that the Loan Agreement expressly authorized Fleet, at its discretion, to request additional financial information from F&R, including BBCs. Similarly, the Court held that Fleet did not breach the covenant of good faith and fair dealing because it had a contractual right to require additional financial reporting, and F&R adduced no evidence that Fleet had a bad motive or intention when it exercised that right. The Court also concluded that, even had F&R been able to substantiate its claims for breach of contract, F&R's claimed injuries were too speculative to warrant recovery.

As to Fleet's breach of contract claims, the Court said it was undisputed that Fleet loaned F&R $1.5 million, that F&R had failed to repay any of the outstanding balance since requested by Fleet in October of 2002, and that Farash guaranteed the loan up to $350,000. Id. at *6. Because Fleet acted reasonably and in good faith in exercising its contractual rights, the Court concluded that F&R breached the Loan Agreement and Farash breached the Limited Guarantee. Both F&R and Farash timely appealed.

II. Discussion[8]

A. Liability for Breach of Contract

Appellants contend that the District Court's factual findings were contrary to the evidence. We disagree.[9] The evidence clearly reveals that any limit on F&R's line of credit beyond that which was provided in the Loan Agreement was placed there through Appellants' own doing. At trial, Farash admitted that it was F&R's bookkeepers, not Fleet, that included the erroneous Inventory Sublimit of $625,000, and that the same Sublimit continued to appear even after Farash discovered the mistake. He also admitted that F&R never received any oral or written notice from Fleet (or Summit) that the Inventory Sublimit was being reduced and admitted that his earlier sworn statements to the contrary were false. Moreover, the testimony of Fleet's witnesses and Fleet's internal documents reveal that Fleet maintained the Inventory Sublimit at $1,250,000, notwithstanding the erroneous BBCs, and Fleet never denied a loan request based on the Sublimit error. Appellants admit that Fleet's assertion that the Inventory Sublimit had never been reduced by Fleet is "technically accurate." (Reply Br. at 8.)

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[8]The District Court had diversity jurisdiction pursuant to 28 U.S.C. § 1332. We have jurisdiction pursuant to 28 U.S.C. § 1291.

[9]We review a district court's factual findings for clear error, which exists when, giving all due deference to the opportunity of the judge in a bench trial to evaluate the credibility of witnesses and to weigh the evidence, we are left with a definite and firm conviction that a mistake has been committed. *Commerce Nat'l Ins. Servs., Inc. v. Commerce Ins. Agency, Inc.*, 214 F.3d 432, 435 n.1 (3d Cir. 2000).

F&R tries to paint Farash's October 2001 meeting with Wainwright and Dvorin as an overbearing encounter, stating that the loan officers "demanded that F&R give them a check to cover the overadvance" and indicated that Fleet had imposed a reduced Inventory Sublimit on F&R. (Appellants Opening Br. at 14.) The record reveals a different picture. Farash brought the supposed overadvance to Fleet's attention in his October 11 letter and volunteered a payment. Wainwright's testimony at trial implied that F&R's payment, made at a meeting that Farash himself described as "cordial," (App. at 2479-80), was not out of the ordinary and would be no reason to trigger an internal investigation into whether F&R was actually overadvanced. Although Farash and Dvorin did discuss the Inventory Sublimit around the time of that meeting, the record just as clearly supports a conclusion that the discussion centered around whether the Sublimit was to be constrained by the inventory value, rather than whether the Sublimit had been improperly reduced to $625,000. Thus, the evidence supports the District Court's conclusion that the reduced Inventory Sublimit was due to F&R's mistakes, not Fleet's actions.

Appellants also make two legal arguments as to the District Court's interpretation of the Loan Agreement.[10] Appellants first argue that it was

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[10]We review a district court's construction of contract terms *de novo*. *Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc.*, 247 F.3d 44, 53 n.2 (3d Cir. 2001).

Fleet's responsibility to correct errors in the BBCs. That argument does not withstand scrutiny. No provision in the Loan Agreement places such an obligation on Fleet. To the contrary, the BBCs themselves required F&R to certify that the information provided was correct. Appellants argue that Fleet was obligated to inform F&R of any errors in the BBC because Fleet generally reviewed BBCs to ensure that they were prepared correctly. Appellants fail, however, to provide us with any basis for imposing a legal obligation on Fleet to conduct those evaluations or to reveal their results to F&R.

Second, Appellants argue that Fleet did not have the authority to require weekly, as opposed to monthly, BBCs from F&R. That argument is belied by the plain language of the Loan Agreement, which authorizes Fleet to require "such additional financial information, data, and documents, in form reasonably satisfactory to the Bank, as may be requested from time to time by the Bank in its sole discretion."[11]

(App. at 712 § 6.16.) Even if, as Appellants contend, F&R vigorously negotiated for monthly reporting requirements at the outset, it cannot avoid the unambiguous language of the Loan Agreement

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[11]There is no support for F&R's contention that the additional information clause should be interpreted "as applying to financial information of [sic] borrower, except for BBCs." (Appellants Opening Br. at 31.) Contrary to Appellants' assertion, the doctrine of ejusdem generis does not assist them. In fact, as Fleet notes, applying it here may be viewed as having the opposite effect: the term "additional financial information, data, and documents" should include BBCs because they are specifically listed earlier. (Answering Br. at 37.) The clear language of that clause also forecloses Appellants' argument that Fleet was not authorized to demand actual inventory counts.

allowing Fleet to alter those requirements later.

B. Liability for Breach of Covenant of Good Faith and Fair Dealing

Under New Jersey law, F&R is required to show "bad motive or intention" as a part of its claim for breach of the covenant of good faith and fair dealing. *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710, 722 (N.J. 2007). Appellants argue that there is sufficient evidence to support a conclusion that Fleet acted in bad faith because "it created a reasonable belief on the part of F&R that its loan availability had been reduced." (Reply Br. at 10.) But the District Court found that it was F&R's own errors that created that reasonable belief, not any representation made by Fleet. As discussed above, that finding is supported by the record.

Appellants argue that Fleet's silence as to the actual Inventory Sublimit was in bad faith. See *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 864 A.2d 387, 397 (N.J. 2005) (holding that a commercial entity may claim a breach of the duty of good faith and fair dealing where another remains silent in the face of a known mistake "with the purpose of exploiting the terms of the contract without regard to the harm caused to plaintiff."). That argument fails. Even if we assume that Fleet's loan officers realized that the BBCs erroneously stated the Inventory Sublimit, there is no evidence that Fleet was exploiting the terms of the contract. To the contrary, F&R received virtually all the money that it was allowed under the Loan Agreement, and there is no evidence that Fleet ever

denied F&R's request for funds based on the erroneous BBCs. Although F&R's interest rate ultimately increased, that was a direct result of F&R's subsequent default for nonpayment, not Fleet's silence.

Appellants also argue that the District Court should have inferred a bad motive based on the "complete absence of rationale for demanding weekly reports." (Reply Br. at 16.) Again, however, the District Court justifiably found that Fleet had a rationale, including a belief that weekly BBCs would assist F&R by improving its cash flow and reducing borrowing costs with accumulated interest. Moreover, Fleet routinely requested weekly BBCs from its other customers. To the extent that these findings were based on credibility determinations, we must give them deference. Further, the record supports another good-faith reason for Fleet's request: F&R's inventory turnover, which relied heavily on the tourism industry, was adversely affected by the events of September 11, 2001.[12]

The District Court's determination that Fleet acted in good faith is adequately supported by the record.[13]

C. F&R's Tort Claims

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[12] As Wainwright and Dvorin both testified, Fleet was concerned that about 80 percent of F&R's business came from the cruise ship industry.

[13] Because we conclude that F&R failed to prove that Fleet breached the Loan Agreement, we need not address Appellants' arguments relating to damages.

We may affirm the District Court's pre-trial dismissal of F&R's tort claims on different grounds than those on which the District Court relied. See Donahue v. Gavin, 280 F.3d 371, 372 n.2 (3d Cir. 2002) ("An appellate court may affirm a result reached by the District Court on different reasons ... as long as the record supports the judgment." (citations omitted)). Because F&R failed to establish that Fleet acted outside of the terms of the Loan Agreement, it is unable to establish, as the stated premise for its tort claims, that Fleet falsely represented that it did not intend to change the terms of the parties' agreement. Thus, the District Court's dismissal of F&R's tort claims was appropriate.

D. Fleet's Breach of Contract Claims

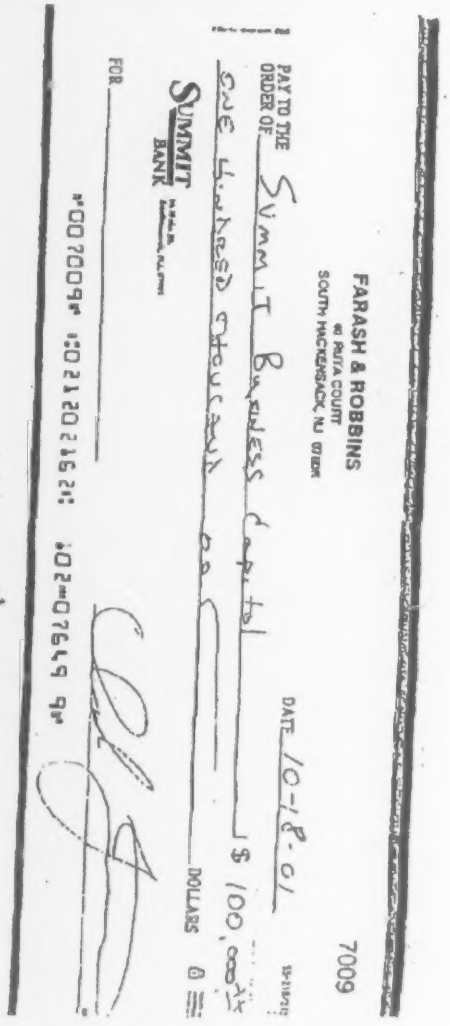
Appellants do not directly contest the District Court's ruling on Fleet's breach of contract claims in favor of Fleet. Had F&R succeeded on either of its breach of contract claims, that might have affected Fleet's right to recover for breach of contract. Appellants do not state their theory as to what that effect would be, however, and, because we have determined that the District Court correctly ruled against F&R on its breach of contract claims, we need not dwell on it any further. Suffice it to say that Appellants do not dispute the District Court's conclusions that Fleet loaned F&R $1.5 million, that the Loan Agreement sets the default interest rate and assesses F&R attorneys' fees and costs, that Farash is a guarantor of the loan up to $350,000, and that F&R has failed to repay any of the outstanding

balance since October of 2002. Thus, we will affirm the District Court's judgment in favor of Fleet and against F&R for breach of the Loan Agreement in the amount of $4,498,051.40 and against Farash for breach of the Limited Guarantee in the amount of $350,000.00.

III. Conclusion

For the foregoing reasons, we will affirm the judgment.

Appendix C — Photocopy of F&R check #7009 with loan officer notation "Paydown to maintain formula"



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